

Commissioning another to do work on your behalf

Another copyright pitfall

In an earlier issue¹ I said that all an employer need do to protect his interests in material produced by his employees eligible for copyright is to ensure that every one of his employees assigns copyright in all works made or to be made during the course of his employment to the employer. The position where one person commissions another to do a work on his behalf is more complicated.

Take the example of a producer who commissions a design firm to devise a design involving the production of artistic works in the form of photographs. If the producer wishes to acquire the copyright in the works produced for his company, he will have to arrange for the design firm to assign its copyright to him or his company. But the actual works will probably be created by the employees of the design firm and not by the firm itself. Since under the 1978 Act the employees of the design firm will themselves be the owners of the copyright in any works that they produce, the design firm will not be in a position to assign that copyright to the producer commissioning the works unless the firm has itself obtained ownership of that copyright from its employees by means of assignment.

The matter becomes even further complicated: The design firm might not employ persons with the necessary expertise to carry out certain aspects of the commission. Accordingly, it might subcontract the taking of certain photographs to a firm of commercial photographers. The firm of commercial photographers might employ individual photographers to whom the job of taking the actual photographs is entrusted. In this situation, since the design firm is required to assign to the producer originally commissioning the job the copyright in all works created pursuant to the commission, the design firm will have to acquire the copyright in all photographs subcontracted to the firm of commercial photographers. But again this firm will not itself own the copyright in the photographs since the actual photo-

graphs will be taken by its employees, and its employees will each individually own the copyright in the photographs that they take. Accordingly, if the firm of commercial photographers is to execute a valid assignment of copyright in the work entrusted to it to the design firm, it will have to enter into assignment agreements with each and every one of its employees. This position can be even further complicated if additional subcontractors are appointed down the line.

From the foregoing it will be clear that the original instigator of the creation of the works, that is, the producer, will only achieve the objective of owning the copyright in all works created pursuant to the commission given if each firm involved in the creative process has entered into agreements with its employees in terms of which its employees assign the copyright in all works created by them during the course of their employment to their employers, and each firm involved in turn assigns the copyright in works created to the person or firm from which it received the commission. This is without doubt a very cumbersome and uncertain situation. The alternative, which is even more cumbersome, would be to have each and every author or creator of a work included in the commission assign his copyright in his work directly to the original commissioner of the work. In the example that we have used this would mean that the producer would have to take assignment of copyright from the employees of the design firm and of the commercial photographers and of other subcontractors further down the line. The multiplicity of assignments with which the original commissioner would have to concern himself would lead to an untenable position.

It is submitted that the solution to the problem would be to include in such commissioning agreements a provision to the effect that the person accepting and executing the commission warrants that he has acquired or will acquire the copyright in any works that are produced pursuant to the commission. This solution is, however, not free from imperfections, since if the person accepting the commission or any subcontractor that he might appoint falls down on the requirement of acquiring copyright from his employee or the person whom he commissions, the warranty

¹(1979) 9 BML 71.

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will not hold good and the person originally commissioning the work will not acquire the copyright in all the works produced in accordance with the commission. In this situation the only remedy that the commissioner would have would be a contractual one against the other

contracting party for breach of the warranty. This would, however, be cold comfort where the copyright in an important aspect of the total commission has gone astray and can no longer be acquired because it has already passed into other hands.

Products liability: an economist's view

The consumer and the risk of defects

A recent article in BML dealt with the question of products liability.¹ Without wishing to dispute the legal interpretations offered by the authors, I feel that the topic calls for further comment. In particular, a fundamental principle of analysis has apparently been overlooked.

The authors of the article suggest that:

'The legal rules governing situations of this kind must be understood against the background of the socio-economic realities in an industrialized society. In such a society the consumer is constantly exposed to the dangers accompanying innumerable defective products.'

As a matter of historical fact, this statement is questionable. Whether cars are less reliable than ox-carts or aspirins are less reliable than leeches are ultimately empirical questions. Nevertheless, the statement does illustrate the fallacy that products liability is in some sense a recent problem. It is not. Nor is it correct to say that 'the consumer is . . . exposed to dangers', since to do so is to ignore the important insight that products liability is a mutual or reciprocal risk, as inconvenient for the producer as for the consumer, especially in the modern competitive environment.

If the consumer must take the risk, he purchases the item knowing his risk and can, in principle, take out his own private insurance against any defects in the item.

If the producer must take the risk and is liable for any defects, the same argument applies. To

reduce his liability he may take out his own insurance or produce a more reliable (and therefore more expensive) product. In either event the extra cost is incorporated in the price of the article. Thus the consumer ultimately pays

- under his own private insurance scheme;
- indirectly under the insurance scheme of the seller; or
- by purchasing a more expensive article.

The advantages of the maxim *caveat emptor* (let the buyer beware) are obvious. The consumer, if he takes the risk, has the option whether to take out insurance or not, otherwise it is compulsory if he buys the product.

The principle is well illustrated in the United States, where the medical profession is facing rapidly increasing claims for damages. High insurance premiums are added to the patient's bill. If liability did not rest with the physician or surgeon, medical fees would be lower and the patient could choose whether or not to purchase his own insurance.

The above argument is simply an application of the 'Coase theorem':

'It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost.'²

The problem at issue is therefore not whose fault it is that the product is defective nor who should bear the cost of insurance. The question is whether consumers should be free to choose the level of risk appropriate to their own situation.

¹F J de Jager and S W J van der Merwe 'Products Liability' (1979) 9 *BML* 81.

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²R Coase 'The Problem of Social Cost' (1960) 1 *Journal of Law and Economics* 1.